In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 881

ANNE FRANCOLINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The judgment of the court of appeals was entered on November 3, 1966 (R. II, 31a). The petition for a writ of certiorari, filed on December 17, 1966, is out of time under Rule 22-2 of the Rules of this Court.

There is in any event no occasion for further review of petitioner's conviction and 18-month sentence for passing counterfeit bills.

The sole issue raised is the validity of the search of an automobile in which counterfeit bills were re-

covered. The pertinent evidence as to this issue was developed through the testimony of Federal Secret Service Agent Sershen (see opinion of the district court, Pet. App. B, A-22-A-29; R. II, 4a-10a).

On the afternoon of the crime the agent received information by radio that counterfeit bills were being passed at a Brooklyn store;[1] that an employee had recorded the license number (KG 9154) of a black Cadillac in which the woman who passed such bills had driven away; and that this car was registered in the name of a business concern at West 3rd Street whose treasurer was Joseph D. Francolino.

At the store the agent learned that the woman passing the notes was young and slender, 5'4" tall, with teased hair; that she was wearing slacks and a leopard kerchief and carrying a leopard-skin bag; and that the man with whom she had left the scene of the offense in the black Cadillac was "baldish", about 40 years old, and 5'8" tall.

Agent Sershen proceeded to the West 3rd Street address and observed the black Cadillac car with the reported license number in the driveway of the house at that address. He and two local police approached the house and rang the doorbell. The mother of Joseph Francolino opened the door, and when the agent

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[1] At trial, three cashiers of various departments of the Brooklyn store identified petitioner as the woman who, on the afternoon of July 24, 1964, in return for change or a small article, tendered them counterfeit $10 bills. Petitioner was also identified by the manager of one of the departments, who, upon discovering the bogus bills, accosted petitioner in the streets and, after a conversation, recovered the store's funds in exchange for the counterfeit money (see R. I).

inquired abut the ownership of the car in the driveway, invited them in. Francolino came down the stairs inside. When asked about the car, he replied that he owned it. He invited Sershen—who displayed his credentials—to come upstairs. Entering a bedroom, the agent saw petitioner—a young woman dressed in slacks who fitted the description given to him. He also saw a leopard-skin handbag on a dresser. He placed petitioner under arrest. When her husband demanded an arrest warrant, and protested that she could not have been involved because he had been driving the car all afternoon, he too was placed under arrest, although he did not fit the description of petitioner's companion on that afternoon.

When Agent Sershen asked for the car keys, Francolino gave them to his mother, who in turn gave them to petitioner. Petitioner extended an open hand and the agent took the keys. A policeman opened the trunk of the Cadillac and found 1973 counterfeit $10 bills—some bearing the same serial number as that of bills passed in the Brooklyn store.

The district court granted a motion to suppress as to petitioner's husband on the ground that there was no probable cause for his arrest, but denied the motion as to petitioner (Pet. App. B 22-29). The court of appeals upheld the order of the district court, correctly ruling that the search of the automobile was valid both as incident to the valid arrest of petitioner and under the Contraband Seizure Act (53 Stat. 1291, 49 U.S.C. 781-789), which provides for the forfeiture of any vehicle "which has been or is being used" to transport or possess contraband articles, including

specifically counterfeit money (49 U.S.C. 781(b)(3)).

The search was valid on another ground as well. The government may search a movable vehicle reasonably believed to be carrying contraband (*Carroll* v. *United States*, 267 U.S. 132; *Husty* v. *United States*, 282 U.S. 694; *Brinegar* v. *United States*, 338 U.S. 160), whether or not there has been a forfeiture of the car (*United States* v. *Walker*, 307 F. 2d 250 (C.A. 4); *United States* v. *Sutton*, 321 F. 2d 221 (C.A. 4); see, also, *Henry* v. *United States*, 361 U.S. 98 at 104; *United States* v. *Ventresca*, 380 U.S. 102, 107, n. 2; *United States* v. *Haith*, 297 F. 2d 65 (C.A. 4), certiorari denied, 369 U.S. 804). The relevant inquiry, moreover, is not whether the vehicle is actually moving, but whether it is so readily movable as to make impracticable the obtaining of a warrant. See *Scher* v. *United States*, 305 U.S. 251; *United States* v. *Walker*, *supra*, 307 F. 2d 250 (C.A. 4). That is a factual question. In the present case, although petitioner and her husband had been placed under arrest, the car was not in police custody, and although the federal agent had received a set of keys, there was still the possibility that petitioner's unidentified companion of that day, or others, might have means to enter the car or to remove it from the locality.[2] In these circumstances the federal agent

[2] The situation is thus quite different from that in *Preston* v. *United States*, 376 U.S. 365, where an automobile was searched at a garage to which it had been towed after its arrested occupants had been booked at a police station. The Court assumed that a search made at the time and scene of arrest would have been valid. 376 U.S. at 367-368.

was not required to make an on-the-spot determination as to the feasibility of securing a warrant. *United States* v. *Gorman*, 355 F. 2d 151, 155 (C.A. 2), certiorari denied, 384 U.S. 1024; *Adams* v. *United States*, 336 F. 2d 752, 753 (C.A. D.C.), certiorari denied, 379 U.S. 977.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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